

Courting Disaster

Bush judicial nominees could shake the foundations of environmental law

BY GLENN SCHERER

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William G. Myers III is George W. Bush's choice for a lifetime position on the U.S. 9th Circuit Court of Appeals. That court's jurisdiction covers three-quarters of all federal lands, in nine Western states where contentious battles rage over energy, mining, timber, and grazing.

Which way will the scales of justice tip?

Unlike most judicial nominees, Myers has never been a judge. Instead, his [qualifications](#) include decades as a paid lobbyist and lawyer to the coal and cattle industries. In his recent position as the Bush Interior Department's chief attorney, Myers tried to give away valuable federal lands to a mining company and imperiled Native American sacred sites. "His nomination is the epitome of the anti-environmental tilt of so many of President Bush's nominees," says Sen. Patrick Leahy (D-Vt.).

Democrats aggressively blocked Myers' appointment with a filibuster in 2004. So when his nomination lapsed at the end of this past congressional session, many legal experts assumed it was dead, along with the nominations of nine other judicial candidates that were blocked by Senate Democrats for their extremist ideology, industry ties, and/or ethical problems. But on Dec. 23, while Americans were distracted by the holidays, the president gave his corporate backers (especially those in the energy and mining industries) a Christmas present: He announced his intent to renominate seven of the filibustered candidates, including Myers. (The other three were given the option of being renominated, but withdrew themselves from consideration.)

"Renomination on this scope and scale of so many judges who the Senate

has refused to confirm has never happened before," says Glenn Sugameli, senior legislative counsel for [Earthjustice](#), a nonprofit public-interest law firm. Noting that Congress has already confirmed 204 of Bush's appointees, Sugameli asserts, "President Bush is trying to convert the Senate into a rubber stamp that will confirm 100 percent of his judicial nominees. That is what is really at stake here."

Also at stake is the future of the U.S. environment. While much attention over natural-resource protection is focused on the executive and legislative branches of government, most decisive battles for the environment are won or lost in the judicial branch. And with Supreme Court Chief Justice William H. Rehnquist fighting cancer, and three other justices in their 70s or 80s, the president may have the chance to fill up to four Supreme Court vacancies with right-leaning anti-environmentalists.



Bush plans to go to the mat for his judicial nominees.

Photo: WhiteHouse.gov.

But as important as those nominations are, Bush's nominations to the lower federal courts are as crucial to the environment. While the Supreme Court takes on less than 100 cases per year, the circuit (or appellate) courts hear more than 40,000 appeals annually and set most legal precedents that become the law of the land.

There are currently 37 federal judicial openings, with 15 of those on the

circuit courts of appeal. For the environment, some of the key open judgeships include three vacancies on the District of Columbia Circuit (the court that hears most environmental cases involving executive-branch regulatory agencies such as the Interior Department, the U.S. EPA, and the Army Corps of Engineers), as well as seven vacancies on the West's 9th Circuit.

"In many ways, the courts are more important than either Congress or the executive-branch agencies," says Patrick Parenteau, professor of environmental law and director of the Environmental and Natural Resources Law Clinic at the Vermont Law School. "Congress may enact the laws, but it does so in very broad, sweeping terms. It is the courts that interpret, apply, and enforce the statutes." Without the courts, such landmark legislation as the Clean Air and Water acts could have been stillborn, he says. "If you don't have courts and judges willing to take a strong stand, those laws never take effect on the ground. They don't change how things are done. The courts give teeth to environmental laws."

President Bush, however, seems intent on extracting those teeth. And one of his key strategies for doing so is to pack the federal courts with right-wing extremists. The likely result could be one of the most heated Senate battles over judicial nominations ever, with some experts predicting the struggle will be a defining moment of Bush's second term.

Taking Care of Business

Perhaps the most disturbing trend in Bush's judicial appointees is their increasingly common links to industry. More than a third of Bush appointments to appellate courts and the U.S. Court of Federal Claims during his first term -- 21 of 59 nominations since 2001 -- have worked as lawyers or lobbyists for the oil, gas, and energy industries, according to a [new investigation](#) by the Center for Investigative Reporting. Three of these

energy industry-linked Bush nominations have been made to the critically important 9th Circuit (with one confirmed so far), another nominated but not confirmed to the D.C. Circuit Court, and four confirmed to the little-known Court of Federal Claims, which deals with "takings" property claims made by developers and industry against the government. "The placement of the nominees suggests an administration strategy of nominating corporate-friendly judges in circuits where they will make the greatest impact," notes CIR. "In many cases, these same corporations and industries are also major campaign contributors to the Bush administration and the Republican Party."

Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst and expert on the history of the nominating process, notes that reliance on special-interest lobbyists to fill prime posts on the federal bench has been rare under past presidents, and he raises questions about the Bush justices' ability to be "fair-minded and objective." Goldman reveals in a 2003 *Judicature* journal article that 9.6 percent of Bush district-court appointments had come from large law firms with 100 or more lawyers, of the type that represent large corporations, while the percentage was just 2 percent under Jimmy Carter, 6.2 percent under Ronald Reagan, and 6.6 percent under Bill Clinton. Of recent presidents, only Bush Sr. recruited a slightly higher percentage of appointees from large law firms, coming in at 10.8 percent.

But Roger Pilon, vice president for legal affairs and director of the ultra-right Cato Institute's [Center for Constitutional Studies](#), denies and downplays such industry ties. "Twenty-one out of 59 judicial nominees had close ties to mining and other extraction industries? It is factually nonsense," he says. "And even if it were true, so what?" Pilon contends that just because judicial nominees lobbied or lawyered for big business and big polluters, that's no reason to think that, once appointed, they will show bias toward their old clients and against the environment. He calls

such thinking "Marxist class-analysis claptrap."

But obviously the National Association of Manufacturers thinks otherwise. This powerful business lobby is about to launch a multimillion-dollar campaign to aid the White House in its bid to win approval for its judicial nominations, [reports the Los Angeles Times](#). The head of the association, former Michigan Gov. John Engler (R), a longtime friend of the president, implied in his *Times* interview that the appointment of federal justices is important to business, partly because of judges' roles in civil liability cases. (Such cases might include corporations being held liable for oil spills, damaged fisheries, toxic waste-causing cancers or birth defects, etc.) It's expected that pressure from the association's powerful members, such as General Motors, might force the reversal of some Democratic senators who fought Bush's most egregious corporate-connected nominees in his first term.

All of this strife over judicial nominations seems to challenge the old stereotype of an impartial U.S. judiciary. And indeed, [a new study](#) shows that political party affiliation does make a difference when it comes to the environment and judges. The study, by the nonpartisan Environmental Law Institute, looked at 325 federal trial and appellate court rulings between 2001 and 2004 concerning the National Environmental Policy Act, a foundation of U.S. environmental law that requires all federal agencies to take into account the impact of their actions on the environment.

It found that a plaintiff with pro-environmental goals had less than half the chance of success before a Republican-appointed judge (a 28 percent success rate) than before a Democratic appointee (59 percent success rate). Conversely, plaintiffs with pro-development or industry goals were successful only 14 percent of the time before Democratic appointees, but 58 percent of the time before Republican appointees.

The GOP judges' anti-environmental stance has grown more pronounced under Bush. Of the 23 NEPA cases heard by the president's appointees, only four were decided in favor of the environment -- that's 83 percent of cases decided in favor of industry, a marked decline from the already poor environmental success rate scored with nominees of past Republican presidents. (The report does note, however, that the Bush judges have served for such a short time that more data will be needed to fully affirm this trend.)

The NEPA study "may or may not show bias on one or both sides," notes Sugameli. "But what it does clearly show is that who sits on the courts matters. It makes a difference, and affects people's ability to breathe clean air, drink clean water, and to enjoy special places."

Law and Disorder

Bush appointees, though relatively new to the federal bench, are already attempting to reinterpret landmark environmental decisions and change the way the statutes apply. In defiance of precedents and the public interest, the 9th Circuit's Richard R. Clifton in a dissenting opinion would have allowed a national-forest timber sale to go forward despite an environmental group's injunction to stop the sale. Meanwhile, the 5th Circuit's Edith Brown Clement and Charles Pickering (both Bush appointments) have joined in a dissenting opinion that would have allowed a commercial and residential development in Texas, despite the risk to listed endangered species living on the site.

But as troubling as this initial erosion of environmental statutes might be, and as damaging as it could eventually become to specific locales and species, worse may lie ahead. Though individual judges can do severe environmental harm, higher courts can still overturn their decisions. Now, though, some ultra-conservative Republican-appointed judges are working

to challenge the very constitutionality of environmental law. And new Bush nominations to the appellate courts and Supreme Court could provide the majorities needed to achieve that goal.

"The most important long-term issue before the U.S. Supreme Court, and the lower courts, is New Constitutionalism," says Sugameli. This extreme anti-regulatory philosophy, also called New Federalism, has been refined by corporations, right-wing think tanks, and the ultra-conservative Federalist Society. Born in the Reagan era, New Federalism opposes big government, and especially the intrusion of the federal government into state and local public services and economic and regulatory matters, according to the Cato Institute website.

New Federalism would repudiate a broad interpretation of the U.S. Constitution's Interstate Commerce Clause, upon which much of federal environmental law is based. Until the 1930s, this clause was used primarily to regulate trade between states. But from Franklin Roosevelt's New Deal era to the present day, judges have interpreted the clause as granting Congress the power to regulate business with regard to wage and hour limitations, health and safety, and the environment.



William G. Myers III.

Photo: DOI.

Some Bush nominees, however, say Congress has no authority to enact such measures. William G. Myers, for example, has argued in amicus briefs submitted to the Supreme Court that federal clean-water and endangered-species safeguards are unconstitutional. The Cato Institute's Roger Pilon agrees: "The Endangered Species Act is utterly unconstitutional," and so are the Clean Air and Water acts "for the most part," he asserts. "The commerce power was written to ensure the free flow of commerce among the states," period.

Destroy that constitutional foundation and you deny Congress the authority to provide most environmental protections, thereby causing the entire federal environmental regulatory structure as it exists today to collapse. It is a radical strategy that, if successful, would shred the safety net of federal laws that has safeguarded the environment for more than 30 years, and which Americans have come to take for granted. Pilon urges that this safety net be replaced with a patchwork of state environmental laws, an approach whose utter failure helped prompt the creation of the federal EPA by Richard Nixon in 1970.

New Federalism doesn't stop there. Anti-regulatory judges -- led by right-wing Supreme Court Justices Antonin Scalia and Clarence Thomas -- also want to severely limit public access to the courts. In particular, they would like to outlaw most citizen lawsuits, thereby barring nonprofit environmental groups from launching cases against polluting industry, uncontrolled development, and unresponsive government.

Pilon contends, along with many Bush nominees, that environmental groups do not have "standing" -- that is, they are not directly harmed (as an individual might be) by environmental damage, so they have no right to sue. Conservatives also say that neither environmental groups nor individuals have a right to sue when private industry damages the commons -- public lands or waters owned by all of us. If a polluter harms

the commons, they say, only the government has the right to sue. And if the government fails to act, the public's only recourse would be to vote out the unresponsive officials.

Barring access to courts is antithetical to democracy, says Sugameli. It biases the system against nonprofit citizen's groups and in favor of businesses. It is also prejudicial. "There is no question that corporations will continue to be able to go to court whenever they don't like an environmental protection," he says. "But there is a serious question as to how much citizens will continue to be able to go to court when they feel that environmental laws are protecting corporations and not people."

Bush conservatives have hit upon still another strategy for attacking the environment: property rights. If Scalia and Thomas were to be joined on the Supreme Court by like-minded Bush-appointed justices, they would have the majority needed to set precedents giving industry privileged private-property rights. "For at least 25 years, since President Reagan, the property-rights movement has asserted that property ownership is absolute and enshrined in the Constitution," says Jay Feinman, a professor at Rutgers University School of Law and author of [*Un-Making Law*](#). That movement sees property rights as a core value of democracy, trumping the authority of Congress to make laws reducing pollution or preserving natural resources. When the government wants to protect air quality, wildlife, or wetlands, the movement contends, it must pay for all profits lost in the forsaking of economic activity, which industry leaders have cleverly -- if erroneously -- labeled "takings."

This very broad definition of property rights, based loosely on the 5th Amendment of the Constitution, has been repeatedly asserted by conservative Republican judges on the federal bench, and especially by Bush appointees. Myers has taken the extreme view that property rights should receive the same level of constitutional scrutiny as free speech.

"What we've seen in the Bush administration is appointees who come out of this property-rights movement and have ties to industry, and who we can expect to advance the cause to undermine government regulation," says Feinman.

Going Nuclear

With Republican control over the executive and legislative branches of government nearly total, Bush's second term will likely be defined by a struggle to solidify control over the judiciary. Two of the best predictors of the probable intensity of that struggle will be the willingness of the Senate to ignore its own time-honored judicial appointment-approval rules, and the extremism of Bush's nominees for open judgeships.

In 2004, conservative Republican senators, angry over Democratic resistance to Bush appointments, began threatening to change Senate rules that would prohibit the blocking of judicial appointments through filibusters. The new rule would do away with the required 60 votes needed to approve judges and replace it with a simple majority vote. "This is called the nuclear option by its proponents, because even they recognize that such a move would blow up the Senate, ending all chance for cooperation on any issue," says Sugameli.

As the 2005 congressional session got under way this month, Senate Majority Leader Bill Frist (R-Tenn.) set the stage for this "nuclear war" by announcing that he will seek approval in February for an unnamed Bush judicial nominee. If Democrats filibuster that nominee, he says, then the nuclear option could come into play, reports the Associated Press.

Richard Epstein, a conservative law professor at the University of Chicago, is critical of the nuclear option but doesn't think it would "blow up" the Senate. "What is important is that the same rules apply to a Republican

president and Congress as to a Democratic president and Congress," says Epstein. Democrats are hopeful that Frist will not dare launch the nuclear option, especially since Sen. John McCain (R-Ariz.) has come out against it, citing the divisiveness it would cause.

As for the extremism of Bush's second-term nominees, his renomination of the seven candidates already blocked by the Senate doesn't bode well for the environment. Among them are such property-rights extremists as Myers and Janice Rogers Brown, who was nominated to the D.C. Circuit and opposed by 35 national and state environmental groups. Brown has declared that the Supreme Court's 1937 decision upholding the New Deal as constitutional "marks the triumph of our own socialist revolution." And her extreme views on property rights caused her to claim that private property is now "entirely extinct in San Francisco" and that the city is implementing a "neo-feudal regime."

As for the Supreme Court, "All the indications are that the people being looked at to fill those vacancies [should they arise during Bush's second term] would include many with very extreme positions," says Sugameli. Bush could also try to elevate either Scalia or Thomas, his two favorites and the two most anti-environmental justices, to the chief justice position.

Bush's lifetime appointments to the federal courts -- most of whom seem to be intentionally selected because of their youth -- will shape and dominate environmental jurisprudence for many decades to come.

Right Young Things

Parenteau believes that the right-wing judicial strategies being pressed by the Bush administration amount to a corporate coup d'etat in which private special interests trump the public good and democracy. "It is probably not hysterical to characterize our situation as a constitutional crisis, because I

feel that the majority values of this country are still strongly in support of strong laws protecting the environment. But what is happening is that those laws are being picked apart, dismantled, and deceptively, stealthily, slyly undermined. I think that our government's checks and balances are breaking down," as corporations gain a death grip on all three branches of government.

Sitting Supreme Court Associate Justice David Souter has long warned against the judicial use of constitutional arguments to invalidate Congress's authority to regulate commerce -- a tactic that could negate environmental, public-health, labor, minority, and women's civil-rights protections in one massive strike. New Federalism is not new, he contends, but will march America back to the *Lochner* era of the courts, which lasted from the post-Civil War period until Roosevelt's New Deal.

Joseph *Lochner* was a New York baker whose corporate right to force employees to work 60-hour weeks was upheld by the Supreme Court. For seven decades, the courts maintained a *laissez-faire* attitude about business practices, ruling that the economic sphere was off-limits to congressional regulation, and that private property, especially corporate private property, was sacrosanct. That era's policies spurred political and corporate corruption, spawning the Robber Baron industrialists, a yawning gap between rich and poor, civil unrest, labor strikes and riots, bomb-throwing anarchists, two presidential assassinations, fierce government repression, genocide against the American Indians, and the near extinction of the American buffalo. It was an era whose gross human injustices were only reversed by New Deal reforms.

In the face of a kind of *Lochner*-era redux, environmental groups have little recourse, Feinman fears. "Other than opposing judicial nominations, we have a real problem here. We can't just wait for the next election, or defeat a bill in Congress. With the judiciary, we are dealing with a matter of

constitutional law. Once high courts rule in an area, there is nothing that can be done by executive action, or by legislation, to change things. That's the end of the story. We could see a rollback of environmental law as part of a much broader rollback of government protection of the public interest. Once again, what is good for General Motors is good for the U.S.A."

"Maybe the Cuyahoga River has to burst into flame again," concludes Parenteau, referring to a pivotal outrage in 1969 that helped launch the environmental movement in the following years. The United States may need to see drastic climate shocks, or Bhopal-scale tragedies, before the public becomes determined enough to reverse the Bush administration's judicial excesses. The political and social shape that such a rebellion might take -- and how long it might take to emerge -- is anyone's guess.